

Fair Work Act 2009
FAIR WORK COMMISSION

s. 156 – 4 yearly review of modern awards

Gas Industry Award 2010

AM2018/10

Substantive issue – meal break conditions

REPLY SUBMISSIONS FOR THE AUSTRALIAN WORKERS' UNION

BACKGROUND

1. The Australian Workers' Union (“**AWU**”) relies on the following submissions in reply to those filed by the Australian Industry Group (“**AIG**”) on 8 November 2018 concerning meal break conditions in the *Gas Industry Award 2010* (“**Gas Industry Award**”).

GENERAL REPLY TO AIG'S SUBMISSIONS

2. AIG's position in this matter is completely at odds with the 4-yearly review Full Bench's decision to the effect that the applicable payments when a meal break is delayed or missed must be “greater than that which would otherwise apply”.¹
3. The effect of AIG's primary position is, for example, that an employee receiving a rate of 250% of the minimum hourly rate for working on a public holiday can be directed to resume work during their meal break and then be paid at a lower rate of 150% for the rest of their shift. That is not a realistic or sensible proposition.
4. Importantly, AIG has not suggested the payment of time and a half or double time rates to a day work permanent employee is not an appropriate level of compensation for having their meal break delayed or missed. That is

¹ *4 yearly review of modern awards – Award stage – Group 1* [2018] FWCFB 5602 at [48] and [61].

unsurprising given a significant merit case would need to be run to justify a change to this current condition.

5. Therefore, the only contentious issue is what level of compensation other groups of employees covered by the Gas Industry Award should receive. For example, employees working at night, on the weekend, on public holidays or those engaged on a casual basis.
6. The answer is simple: all employees should receive the same level of compensation for having their meal break delayed or disturbed. There is no logical basis to distinguish between these different groups of employees in relation to the appropriate compensation for having a meal break delayed or missed.
7. That inevitably leads to the conclusion that the appropriate compensation for an employee who misses their meal break or performs work during their meal break is an additional payment of either 50% or 100% of the minimum hourly rate.
8. In the absence of a provision specifying these rates are in substitution for any other condition – the rates are paid in addition to any other entitlements applicable under the Gas Industry Award including: casual loading, first aid allowance, night shift payments and penalty rates.
9. This outcome is fair and appropriate. The casual loading and first aid allowance do not include compensation for having a meal break delayed or missed. Neither do shift work loadings or penalty rates.

SPECIFIC REPLY TO AIG'S SUBMISSIONS

10. AIG's submission suggests at paragraph [16] and [17] that the rate payable to an employee may be unclear if the Commission's proposed clause² is adopted.
11. The practical effect of the Commission's proposed clause for an employee working on a Sunday is they receive their minimum hourly rate plus an additional payment of 100% of the minimum hourly rate for working on a Sunday and an additional payment of 50% or 100% if their meal break is delayed or missed. This is a total of 250% or 300% of the minimum hourly rate.

² 4 *yearly review of modern awards – Award stage – Group 1* [2018] FWCFB 5602 at [49].

12. Given AIG does not appear to accept the cumulative effect of award provisions, the same issue may arise with other parties. Hence, there may be merit in the Gas Industry Award referring to an additional payment of 50% or 100% of the minimum hourly rate rather than stating that an employee will receive 150% or 200% of the minimum hourly rate. A term to this effect for the Full Bench's consideration is included at the end of these reply submissions.
13. Contrary to paragraph [22] of AIG's submission, there is material before the Commission to determine the appropriate rate for an employee whose break is delayed or missed.
14. Clause 22.2 of the Gas Industry Award provides for an additional payment of 100% of the minimum hourly rate if a break is not provided and clause 22.3 provides for an additional payment of 50% of the minimum hourly rate if an employee resumes or continues work in a break. AIG is not suggesting these are not appropriate penalty rates for permanent day workers. There is no logical reason why the appropriate penalty rate would differ for other groups of employees.
15. AIG suggest in paragraph [27] of their submission that the purpose of the higher rate paid when a meal break is delayed or missed may be to compensate employees. However, the submission then states this does not necessarily mean a higher rate than what the employee is already receiving should apply.
16. It is difficult to comprehend how an employee is being compensated for having their break delayed or missed if they simply continue receiving the same conditions they were already receiving or even a lower rate.
17. The receipt of a penalty rate for working on a weekend or public holiday does not constitute compensation for having a break delayed or missed. Penalty rates have been assessed and awarded based on the conditions associated with working on a weekend or public holiday – this did not involve an assessment of an appropriate rate for having a break delayed or missed. The same applies for the 25% casual loading, shift loadings and the first aid allowance.
18. AIG's submission contains references to "in our experience" at paragraph [30] and "it is our understanding" in paragraph [32]. These statements should not be mistaken for evidence. AIG could have led evidence to explain their experience or their understanding but have not done so. In these circumstances, the Commission cannot rely on the accuracy of the statements – they are purely speculative.

19. AIG's submission refers at paragraph [34] to a "windfall gain" for employees if the Commission's proposal is adopted. The only "windfall gain" will be if AIG's argument succeeds and an employer directs an employee being paid at 200% of the minimum hourly rate for working on a Sunday to take their meal break and then deliberately interrupts the break with a direction to resume work so they can pay them at 150% of the minimum hourly rate for the remainder of the shift. A fair and relevant safety net cannot permit this conduct.
20. In response to paragraph [56] of AIG's submission, there is a sound merit basis for the payment of a penalty of an additional 50% or 100% of the minimum hourly rate to an employee whose break is delayed or missed – this is precisely the amount paid to an employee under clause 22.2 and 22.3 of the Gas Industry Award. AIG appear to accept this is an appropriate level of compensation for permanent day workers who are not receiving a casual loading, shift loading or penalty rates.
21. AIG's reliance on a range of other award conditions is misplaced because they have misinterpreted the effect of these provisions. Only one of the identified provisions appears to refer to an additional payment for an employee whose break is delayed or missed not being cumulative – clause 26.1 of the *Transport (Cash in Transit) Award 2010*. In the absence of a provision to this effect, the entitlements apply on a cumulative basis.
22. AIG's submissions at paragraph [83] and [84] about the penalty rates for working through a meal break being "cost prohibitive" make little sense. AIG is not claiming the current payment of an additional amount of 50% or 100% of the minimum hourly rate to permanent day workers should be changed. The cost for an employer of an employee not getting a break or having it disturbed will always be the same under the Commission's proposed clause – an extra 50% or 100% of the minimum hourly rate.
23. The AWU generally agrees with AIG's submission at paragraph [85]. The Gas Industry Award allows an employer the flexibility to require an employee to work without a break or to resume or continue work during a break. An employee is compensated by an additional payment of 50% or 100% of the minimum hourly rate. This strikes a fair balance between the competing interests as opposed to a term which allows an employee to have their break disturbed in return for the receipt of a lower rate.
24. AIG boldly submit at paragraph [88] that the Commission's proposal "would adversely impact business in various ways". No evidence is provided to substantiate this statement. If the impact would really be so adverse, it is odd

that no specific employers in the gas industry are providing this evidence to the Commission.

25. Contrary to paragraph [89] of AIG's submission, it is not "self evident that the Commission's proposal would significantly increase employment costs". This submission should be rejected. It is not supported by any evidence concerning how employers are currently applying the meal break provisions and how often meal breaks are delayed or missed. A "significant increase in employment costs" cannot be established by a mere assertion.

MODERN AWARDS OBJECTIVE

26. An award term that permits an employer to require an employee to miss or delay their meal break and in return compensates an employee with the payment of an additional 50% or 100% of the minimum hourly rate is consistent with a fair and relevant safety net of conditions.
27. Flexibility is provided to employers because they can require an employee to work during a break. This may assist in promoting the efficient and productive performance of work in some circumstances: s 134(1)(d) of the FW Act.
28. An additional payment of 50% or 100% of the minimum hourly rate to an employee who misses their meal break or has it delayed provides additional remuneration for working unpredictable hours: s 134(1)(da)(ii) of the FW Act.
29. A term which doesn't allow the rate payable when an employee's meal break is delayed or missed to be subsumed by payments made for other reasons – such as working at night or on the weekend, ensures appropriate additional remuneration is paid for working on weekends and working shifts: s 134(1)(da)(iii) and (iv) of the FW Act.
30. Having an entitlement that applies consistently to all groups of employees results in a simple, easy to understand, stable and sustainable modern award system: s 134(1)(g) of the FW Act.
31. The cost implications for employers arising from a term to this effect are unknown and may well be zero if the employer is already paying a standard penalty of 50% or 100% of the minimum hourly rate to all groups of employees who have their meal break delayed or missed – which the AWU considers is the correct approach under the current Gas Industry Award.
32. The lack of evidence from employers about the proposed changes suggests there is not a significant level of concern about cost implications: s 134(1)(f) of the FW Act.

CONCLUSION

33. The AWU considers the Gas Industry Award already requires an additional payment of 50% or 100% of the minimum hourly rate to an employee who has their meal break delayed or missed and the reviewed award should also contain a term to this affect.

34. Given the AIG has raised some concerns about how the Commission's proposed term would operate, the AWU suggests the following wording:

9.1 Meal breaks

(a) A meal break of at least 30 minutes must be allowed to employees within five hours of the start of their shift.

(b) Employees required to work for more than five hours without a meal break as provided for in clause 9.1(a) must, for all time worked in excess of the five hours before being allowed a meal break, receive an additional payment of 100% of the minimum hourly rate. This amount is in addition to any other amounts payable under the award.

(c) Employees required to continue work during the meal break must receive an additional payment of 50% of the minimum hourly rate for all hours worked from the beginning of the scheduled meal break until the full meal break is given. This amount is in addition to any other amounts payable under the award.

(d) Employees required to resume work during the meal break must receive an additional payment of 50% of the minimum hourly rate for all hours worked from resuming work until the full meal break is given. This amount is in addition to any other amounts payable under the award.

34. This term:

- is consistent with the additional payments already prescribed in clause 22.2 and 22.3 of the Gas Industry Award;
- is fair for employees because it provides equal compensation for all groups of employees;
- is fair for employers because it allows them to direct an employee to perform work during a break or to determine that a break will not be observed;

- ensures an employer cannot save money by directing an employee to not observe a meal break or by interrupting an employee's meal break; and
- is generally consistent with how this type of provision operates in many other modern awards.



STEPHEN CRAWFORD
SENIOR NATIONAL LEGAL OFFICER

7 DECEMBER 2018